Supreme Court of the United States

OCTOBER TERM, 1899.

No. 263

THE LOUISVILLE TRUST COMPANY,
Petitioner,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for The Farmers' Loan and Trust Company and others, Appellees.

ADRIAN H. JOLINE,
HERBERT B. TURNER,
GEORGE W. KRETZINGER,
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THE LOUISVILLE TRUST COMPANY, Petitioner, Appellant, vs. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY ET AL., Appellees.	No. 263.

Brief for The Farmers' Loan and Trust Company, John H. Barker, the Central Trust Company of New York, John H. Stotsenburg, James Murdock, F. P. Olcott, Henry W. Poor and Henry C. Rouse, Appellees.

This cause comes before the Court upon the return of a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit, to review the decision of that Court affirming a judgment or decree of foreclosure and sale rendered by the Circuit Court of the United States for the District of Indiana.

Statement of Facts.

In August, 1896, the Louisville, New Albany and Chicago Railway Company was a corporation existing under the laws of Indiana, with corporate power to

own and operate railways in Indiana and other States. Its line extended from New Albany, Indiana, to Michigan City, Indiana, and from Indianapolis to Hammond, Indiana, and it had leases or trackage rights over the Chicago and Western Indiana Railroad from Hammond, on the westerly boundary line of Indiana, to and into Chicago, and over the Pittsburg, Cincinnati and St. Louis Railway and the Louisville and Nashville Railroad and the Louisville Bridge Company's tracks, from New Albany, Indiana, to and into Louisville, Kentucky. It also held certain shares of stock of other railway companies *(Record*, p. 2*)*.

The bonded debt of the railway company (hereinafter for brevity referred to as the "Monon") secured by mortgage upon its property or parts thereof was as follows *(Record*, pp. 3, 169–182*)*.

(1) Three million dollars six per cent. bonds, called "Main Line Bonds," secured by mortgage to John C. New and Washington C. DePauw, trustees, dated July 1, 1880, and covering the main road from New Albany to Michigan City, 288 miles.

(2) Two million three hundred thousand dollars six per cent. bonds, called "Air Line Bonds," secured by mortgage to John C. New, trustee, dated August 10, 1881, and covering the road from Indianapolis to Hammond.

(3) Four million seven hundred thousand dollars six per cent. bonds, called "Consolidated Bonds," secured by mortgage to the Farmers' Loan and Trust Company and John H. Barker, trustees, dated January 1, 1886, and covering all the railways and corporate stocks of the Monon.

(4) Two million eight hundred thousand dollars five per cent. bonds, called "General Mortgage Bonds," secured by mortgage to the Central Trust Company of

New York and John H. Stotsenburg, trustees, dated May 1, 1890, covering the same property as the consolidated mortgage.

(5) One million dollars five per cent. bonds called "Equipment Bonds," secured by mortgage to the Central Trust Company of New York and James Murdock, trustees, dated September 1, 1894, covering all the property of the Monon, and constituting a first lien on a large amount of equipment (p. 178). Of these bonds $709,000 were outstanding (p. 179).

NOTE. By some accident the statement of the $2,300,000 Air Line bonds has been dropped out of the Record on page 3. There will be no dispute as to the existence of these bonds.

In 1889 and 1890 the Board of Directors of the Monon had caused to be placed upon $1,185,000 six per cent. bonds of a Kentucky railroad company called the Richmond, Nicholasville, Irvine and Beattyville Railroad Company (hereafter called the Beattyville Company) an endorsement obligating the Monon Company to guarantee the payment of the principal and interest of such bonds. The validity of the alleged guaranty was contested by the Monon, and in a suit prosecuted in the United States Circuit Court for the District of Kentucky the guaranty had been adjudged to be invalid (69 Federal Reporter, 431); that judgment had been reversed by the Circuit Court of Appeals for the Sixth Circuit (43 U. S. Appeals, 550). Upon a writ of *certiorari* the decision of the Circuit Court of Appeals has been brought before this Court, and the matter argued and submitted, but as yet no decison has been rendered.

On August 24, 1896, one John T. Mills, Jr., obtained a judgment in the Circuit Court of the United States for the District of Indiana against the Monon Company for $494,911.35, upon notes given by the company

for borrowed money. Execution was issued thereon, and upon its return unsatisfied, Mills filed a creditor's bill in the same Court and procured the appointment of W. H. McDoel as Receiver *(Record*, pp. 2, 10.*)*

In view of the assertion of appellant that this was a "prosperous railroad company" which "had never made a default in payment on its mortgage bonds," reference may properly be made to some allegations of the Mills bill which have never been denied.

This bill alleged, among other things, that the floating debt of the Monon, including the Mills judgment, was nearly $1,000,000. It further referred to the claim of the appellant and others, based upon the guaranty of the Beattyville bonds, which amounted to $1,185,000, with over forty-two per cent. interest *(Record*, pp. 4, 5*)*.

It also alleged that the Beattyville Company's railroad had never been completed; that the Beattyville Company was insolvent; that the entire Beattyville property was insufficient to pay construction liens ahead of the mortgage; that the Louisville, New Albany and Chicago Company had no resources with which to pay its unsecured debts except the surplus earnings from its road which would remain after paying its fixed charges of $1,200,000 a year; and that depression in business had greatly diminished the earnings *(Record*, pp. 5, 6, 7*)*.

At the outset the Court of its own motion made an order requiring the Receiver to file a report within twenty days, showing the obligations of the defendant railway company, secured and unsecured, when payable, and whether, after paying operating expenses, the interest could be paid on the mortgage bonded debt as it matured, so as to prevent default *(Record*, p. 13.*)* The report does not appear in the record, but it was in fact filed, and this Court will presume that the report was made in compliance with the order, and that the

Court was satisfied that payment of the interest on the bonded debt was impossible.

Thereafter the Farmers' Loan and Trust Company and the Central Trust Company of New York, with their associate trustees, filed their several bills in the same court to foreclose the three mortgages described in the bills (*Record*, pp. 20, 58, 107). Each of the bills alleged insolvency, demand for interest and default; and that the Receiver appointed on the Mills bill was in possession of and operating the mortgaged property.

On November 12, 1896, the two foreclosure bills then on file were by order of the Court consolidated with the Mills bill (*Record*, pp. 97, 98), and on December 21, 1896, the third foreclosure suit was also consolidated with the other consolidated suit (*Record*, pp. 145, 146).

On December 24, 1896, the Farmers' Loan and Trust Company and John H. Barker, as trustees, filed an amended and supplemental bill relative to certain branch properties (*Record*, pp. 146, 147), and thereafter the two branch companies were made defendants (*Record*, p. 160). On the motion of the trustees the Court extended the receivership in the Mills suit to the consolidated cause.

The several defendants answered the several foreclosure bills, but did not put in issue any of the material allegations of the bills (*Record*, pp. 163-165). The various defendant trustees also answered, admitting the allegations of the several foreclosure bills (*Record*, pp. 165, 166).

Hence, on January 23, 1897, the pleadings of all the parties defendant to the foreclosure bills being on file, and there being no material allegations of said bills in issue or denied, and no proofs being required in order to authorize the entry of a decree of foreclosure and sale, application was duly and regularly made to the Court for such decree upon bills and answers.

On the same day the Louisville Trust Company filed an intervening petition *(Record,* pp. 166-168*)*. This petition set forth facts tending to show only that the petitioner was a general creditor of the Louisville, New Albany and Chicago Railway Company, and prayed that it might be authorized to appear on its own behalf and on behalf of all others holding similar claims and take such steps and proceedings as it might be advised by counsel. *It did not contain a single allegation tending to controvert any allegation of any of the foreclosure bills and offered no issue upon any point embraced in those bills.* No answer, demurrer or other pleading of any description was tendered to the Court, and no application made for leave to file any pleading.

The Court made an order that the Louisville Trust Company and the Kentucky National Bank might be admitted to appear in the proceedings in the cause, each on its own behalf *(Record,* p. 166*)*, and *at the same time* made and entered the decree of foreclosure and sale *(Record,* pp. 168-188*)*.

The decree adjudged that all the material allegagations of the foreclosure bills were true, and directed foreclosure of the several mortgages set out in the bills of complaint of the trustees and a sale thereunder. It made express provision for the payment of the Receiver's indebtedness and of any claims which might be adjudged to be prior in lien to the mortgages foreclosed, reserving the right to retake the property in case of the failure of the purchaser to comply with any order of the Court in repect thereto *(Record,* pp. 185, 186*)*. It also adjudged that all questions not thereby disposed of should be reserved for future adjudication, and the Court reserved "full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same."

On February 27, 1897, thirty-five days after the entry of the foreclosure decree, the Louisville Trust Company filed a second petition *(Record,* pp. 189-198*)*.

This was filed without prejudice to the right of the complainants to move to strike the same from the files (*Record*, p. 189). This petition contained various charges and allegations tending to negative the right of the trustees to foreclose their mortgages, and prayed that the decree of foreclosure and sale be set aside, that the mortgages should be declared to be invalid, and that the assets of the railway company should be ascertained and the same distributed among general and unsecured creditors. It also prayed that an order should be entered commanding some of the parties to the consolidated cause, but not all, to appear and plead to the allegations of the petition.

No such order to plead was ever made, and it does not appear by the record that any application for it was made, except only by filing the petition.

No showing or excuse of any kind was made for not setting up these alleged defenses before the entry of the decree of foreclosure, and even this petition did not ask leave of the Court to interpose any answers or demurrers to the bills.

On March 9, 1897, the day before the day fixed for the sale under the decree, this petition came on to be heard, and the Court refused to vacate the decree of foreclosure or to postpone the sale (*Order*, *Record*, p. 198).

The sale was made to the bondholders' committee and on the same day an application was made to confirm the Master's report. All the parties to the foreclosure bills appearing and consenting, an order of confirmation was entered (*Record*, pp. 199-201, 201-203).

Thereafter the Louisville Trust Company filed a petition of appeal and assignment of errors (*Record*, pp. 203-206). The appeal was heard by the Circuit Court of Appeals for the Seventh Circuit and the decree was affirmed (*Opinion*, *Record*, pp. 217-223).

On March 21, 1898, the Louisville Trust Company filed its petition for a writ of *certiorari*, which was

granted by this Court *(Record*, p. 225*)* and the return was duly filed September 8, 1898.

The other material facts will be referred to in the argument.

ARGUMENT.

FIRST. The Louisville Trust Company, the petitioner and appellant, had no standing in court to assert any objections to the entry of the decree of foreclosure and sale.

I. It is not necessary to support by reasoning the proposition that a complainant in a suit to foreclose a mortgage is entitled to a decree upon his bill unless a defendant in the suit interposes some defense by answer or demurrer. The complainant is entitled to a decree according to the prayer of his bill, if no party contests, by a proper pleading, his right thereto. No answer or demurrer on the part of the appellant was even filed or even offered.

Upon this hearing we find an appellant who never filed a pleading in the cause, either to the creditor's bill or to any of the foreclosure bills, and who, so far as the record shows, *was never even made a party defendant.*

For appellant, being a general creditor, was in that respect in like situation with Mills, the complainant in the judgment creditor's suit, whose bill was filed "in behalf of himself and all others in like relation" to the property of Monon *(Record*, p. 8*)*.

The order admitting appellant as a party simply provided "that the said Louisville Trust Company and the said Kentucky National Bank be, and they are hereby, admitted to appear in the proceedings in this case, each in its own behalf." They had not asserted

any *lien*, or asked to be admitted as defendants to the foreclosure bills. They had no judgments, and in that respect they did not bear the same relation to the property of the Monon. But at the most, they could appear only as co-complainants with Mills, and as they neither filed nor asked to file any answers or defenses of any description, they must have adopted his bill of complaint and all its allegations. That bill admitted and asserted the validity and priority of the mortgages.

If appellant had intended, in good faith, to defend against the mortgages, it should have prayed leave to plead to the foreclosure bills and tendered some issue to the complainant mortgagees.

The Circuit Court of Appeals, in its opinion, very forcibly and tersely says :

" The appellant comes to this Court and asks for all the benefit and advantage that it might have had if it had asked and obtained leave to put in an answer and had produced evidence to defeat the equities of the bill. We know of no precedent for such a practice; it would be a travesty upon equity proceedings" *(Record*, p. 221*)*.

The attention of the Court is especially directed to the fact that the petition on which appellant was allowed to become a party *(Record*, pp. 166-168*)* "alleged nothing whatever against the foreclosure or the validity of the mortgages, or the equities of the complainants' case, but merely set up facts which would entitle the petitioner to share in any surplus or assets not covered by the mortgages" *(Record*, p. 221*)*.

II. If the appellant, a general and unsecured creditor, were entitled to assert any defense whatever against the mortgages (which is not admitted), it was its duty to move the Court for leave to present its defense by demurrer, plea or answer. By failing to file a pleading it waived any possible right to be heard to object to the foreclosure, either in the Court of original jurisdiction or in any appellate tribunal.

The proper practice is well set forth in *Toler vs. East Tennessee, Virginia and Georgia Railway Company*, 67 Fed. Rep., 168. In that case certain persons sought to intervene for the purpose of defeating the foreclosure of a railway mortgage. Judge LURTON says :

" An application to be allowed to answer and defend and to file a cross-bill should be accompanied by the proposed pleading. The analogy between such an application and an application to file an amended or supplemental answer, or to set aside a *pro confesso* and be allowed to answer is most obvious. In either of the analogous cases the application should be by petition accompanied by a full copy of the proposed pleadings (1 Daniell, Ch. Pl., 4th Am. Ed., 781 ; Beach, Mod. Eq. Prac., § 394). The object in requiring an appli- of this nature to be accompanied by a full answer is, first, not to delay the complainant in his suits, and, second, that the Court may see that a real defense is presented (pp. 174, 175).

The complainants were not notified that there was any dispute as to their right of recovery, and were not called upon, by any rule of law, to wait for an indefinite period until the appellant might, at its convenience, see fit to plead to the bills.

III. The second petition, filed after the decree of sale, was too late. The application based upon it was addressed only to the favor of the Court. Its consideration involved no matter of right, but merely a question of discretion as to the opening of the decree. This Court will not review that exercise of discretion.

IV. The appellant was neither a necessary nor a proper party to the foreclosure bills, because it neither had nor asserted any lien by judgment or otherwise, upon the mortgaged premises.

It was an unsecured creditor without lien, and " it had no right to interfere in the contests between its debtor and third parties."

Bronson vs. Railway Co., 2 Black., 524.

Herring vs. Railway Co., 105 N. Y., 340.
Jones vs. Winans, 20 N. Y. Eq., 96.
Stout vs. Lye, 103 U. S., 66.

It is not intended to assert that a general creditor may not, upon allegations of fraudulent collusion between a debtor and his mortgage creditors, be admitted to contest the enforcement of a mortgage lien upon the debtor's property, for it is not necessary to so contend in this case. The appellant did not resort to any proceeding based upon any such allegations to present that issue in such a manner as to enable the complainants to have an adjudication.

It merely came into Court on the same day and *at the same time* that the foreclosure decree was entered *(Record*, p. 168*)*; asserted that it was a general creditor of the mortgagor, and interposed no objection to the foreclosure.

But, if the appellant were entitled to be heard to assert any of the errors assigned, there is no merit in any of the objections urged against the decree.

Second. THE DECREE OF FORECLOSURE AND SALE WAS NOT ENTERED PREMATURELY. THE COMPLAINANTS IN THE BILLS OF FORECLOSURE WERE ENTITLED TO A DECREE UPON THE BILLS AND ANSWERS.

The appellant insists that, because the foreclosure suits and the general creditor's suit had been consolidated into one suit, no decree could be entered upon the foreclosure bills separately, and that the whole suit must be determined by a single decree, rendered upon the Mills bill as well as the bills of the mortgage trustees.

This proposition cannot be sustained.

I. As matter of fact, the Mills suit was ready for

decree. The railroad company, defendant, had admitted by answer all of the allegations of that bill. A decree rendered upon the Mills bill could have affected only the general assets of the debtor not covered by the mortgages and applicable only to the claims of general creditors. The fact that no one asked for such a decree does not affect the question whether or not that cause was ready for decree.

II. But the complainants in the foreclosure bills were not obliged to wait until the general creditor's suit was ripe for decree.

It would be a strange thing if a general creditor could seize mortgaged property in a suit begun in advance of a default on the mortgage, thereby drawing into the particular court the sole jurisdiction of all suits affecting the *res*, and then compel the bondholders to wait for the settlement of matters in dispute between the debtor and his general creditors.

The suits were consolidated in accordance with the following provision of the Revised Statutes of the United States:

"When causes of a like nature, or relative to the same question, are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein *as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice*, and may consolidate said causes when it appears reasonable to do so."

U. S. Rev. Stat., § 921.

In *Mutual Life Ins. Co. vs. Hillman*, 145 U. S., 285, where several suits had been consolidated under the authority of this statute, the Court say:

"But, although the disputants might lawfully be compelled, at the discretion of the Court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments."

It appears, therefore, that there is no foundation for

the contention that there may be but one judgment in a consolidated cause. The order in this case was "conformable to the usages of courts," and served to "avoid unnecessary delay."

The nature of a consolidated cause of this description was considered by Judge TAFT, in the United States Circuit Court for the Northern District of Ohio, in thecase of *Continental Trust Company vs. Toledo, St. Louis and Kansas City Railroad Company*, 82 Fed. Rep., 645. In that case there was a judgment creditor's bill, under which a Receiver was appointed, a subsequent foreclosure bill, and order consolidating both suits. A motion was made to dismiss the foreclosure bill, on the ground that the Court had no jurisdiction of the foreclosure bill, and also to set aside the order of consolidation. It was admitted that there was jurisdiction of the creditors' bill. The Court, holding that the possession under the creditors bill was sufficient to sustain jurisdiction, and referring to the foreclosure bill as a dependent bill ancillary to the creditors' action, says:

"Care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. *Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action.* * * * The rule as to who may appear to a foreclosure bill and file answers is the same here as if the bill had in fact been an independent bill. In other words, the relation between the two suits is principal and ancillary only so far as that, without possession of the *res* in the former suit, the court would have no jurisdiction of the latter; but, having thus acquired, and thus maintaining, its jurisdiction in the second suit, *the court proceeds in it without further regard to the pleading or course of the principal action.* In view of their relation to each other, there cannot be the slightest objection to consolidating the two suits, if they are otherwise of such a character as to permit it. I shall not stop to discuss the power of the court in this regard. It suffices to say that the duty of the court to consolidate causes, where no one will be injured thereby, is plainly sug-

gested by the Federal statute on the subject (Revised Statutes, sec. 921), and one of the commonest instances of the exercise of this power is the consolidation of a creditors' bill and a foreclosure bill against the same insolvent railroad corporation."

There was no reason upon the record why the foreclosure should be delayed to audit the ascertainment of the general assets and the amount of the unsecured debts.

Here were foreclosure cases which were ripe for decree. A general creditor, on the same day that the decree is entered, files an intervening petition, which alleges nothing against the foreclosure, but merely sets up such facts as would entitle the petitioner to share in any assets not subject to mortgage. The complainants are not notified that there is any dispute as to the truth of the allegations of their bill, no answer or pleading is tendered, and they proceed to decree. What should they do? Should they wait an indefinite period, until this intervenor might choose to present his pleading to the Court? Is there any rule of law or practice which requires them to call upon such intervenor to plead to the bill, when he asserts no right except that of a general creditor, and so far as such rights are concerned he is in court already in the person of the debtor and mortgagor corporation?

When it is considered that to this day there has never been an issue tendered to the mortgage trustees, upon which they could take testimony or prove the allegations of their bills, it will be seen that to require them now to sustain their decree as if upon proofs would be most unjust.

The contention of the appellant below was that "if the decree and sale stand, general creditors of the 'Monon' have had the entire property of their debtor sold without their having a hearing or being given an opportunity to prevent the need of a sale." This implies that no mortgaged property may be sold under any fore-

closure until general creditors have been made parties to the foreclosure proceeding. There is no such rule of law.

The question before the Court was not whether a sale was needed or not, but whether the complainants were entitled to a decree of sale.

Counsel said in the court below :

" We do know, however, that this suit was only instituted to free the 'Monon' from the debt that the Circuit Court of Appeals for the Sixth Circuit has said it incurred by its guaranty of the Beattyville bonds. We do know that during times much worse than those existing at the time of and since the filing of this suit the 'Monon' always was able out of its earnings to pay the interest on its bonded indebtedness."

Counsel certainly did not know any such alleged facts from anything in the record. The statements quoted are not sustained by anything which appears before this Court.

Counsel said : " We are certainly entitled to an opportunity to present our claims." The difficulty is that, having had full opportunity at any time between November 12, 1896, and the date of the decree, to appear, be made a party defendant in and plead to the foreclosure bills, appellant refrained from doing so, and seemed to be under the impression that it was the duty of the Court and of the parties to delay the proceedings until such time as, in the good pleasure of the appellant, it should see fit to come into Court in the usual way.

There is nothing in the record to show that any party or person entitled to be heard made any objection to the entry of the decree of foreclosure and sale. It is too late, after the decree has been entered, for an intervenor to object. Such application must be addressed to the favor of the Court. It is not a matter of right. The appellant made such an application, which was denied.

Third. THE TRUSTEES IN THE MORTGAGES ON WHICH THE DECREE WAS ENTERED WERE ENTITLED TO INSTITUTE THEIR SEVERAL PROCEEDINGS ON SUCH MORTGAGES AT THE TIME WHEN INSTITUTED, AND THE CIRCUIT COURT DID NOT ERR IN DECIDING THAT, ACCORDING TO THE TERMS OF THE SAID MORTGAGES, THEY WERE ENTITLED TO A DECREE OF FORECLOSURE AND SALE.

I. The appellant's counsel did not dispute, in the Court below, that the mortgages other than the Farmers' Loan and Trust Company mortgages were, by their terms, enforceable immediately upon default in the payment of interest; but it was contended that the consolidated mortgage could not be foreclosed until the default in payment of interest had existed for six months.

The mortgage in question provides that until default shall be made in the payment of the principal or interest, the mortgagor may remain in possession; and that, if default shall be made and continue for six months, the trustee may enter upon the premises and sell the property *(Record*, pp. 74, 75*)*.

It also contains a provision that, if default in payment of interest be made and continue for six months, the trustees may apply to a Court for foreclosure, and for the appointment of a Receiver *(Record*, p. 75*)*.

Covenants of this description have been frequently construed, but we find no reported case where they have been held to prevent a foreclosure in equity.

Counsel contends that the numerous cases, some of which are referred to in his brief, in which it has been held that the six months' postponement common in mortgages of this description does not prevent application to the Court for foreclosure, have proceeded solely upon the ground that such six months' postponement applies only to the summary right of entry and sale by the trustee, and, being cumulative, does not apply to an equity proceeding to foreclose. It is argued that a provision permitting the trustee to fore-

close by suit in equity after default shall have been made and continued for six months is an exclusion of any right to act before that time, according to a familiar maxim.

Some of the adjudicated cases have proceeded upon that ground, but not all.

In *Mercantile Trust Co. vs. Chicago, Peoria and St. Louis Railway Co.*, 61 Federal Reporter, 372, the mortgage provided—as in the present case—that, in case default should be made in the payment of interest, and such default should continue for the space of six months, it should be the duty of the trustee to take appropriate proceedings at law or in equity to enforce the rights of the bondholders, upon a requisition to that effect by the holders of one-third in amount of the bonds. It was urged that this prevented a foreclosure until the six months should have expired.

Judge Woods, holding to the contrary, refers to the second article of the mortgage, limiting the right of the mortgagor to continue in possession until default in the payment of interest (which is exactly similar to the corresponding clause in the consolidated mortgage), and to the third article of the mortgage, which related to the summary right of entry and sale. He says:

"It is claimed, and I think correctly, that the trustee's right to take possession under the third article is limited to cases where interest has been overdue for six months, and it is insisted that his right to foreclose and to procure a Receiver to take possession under the order of the Court, is likewise limited. If that were so, then the possession of the mortgagor could not be disturbed for any default until after the lapse of six months, and the second article would be entirely nugatory; and, without the consent of the holders of two-thirds of the bonds, there could be no foreclosure—a proposition by which the minority might nullify the rights of the majority."

Judge Woods states so clearly the reason for not construing these permissive clauses to be exclusive that we quote his language:

"A mortgage is a security for a debt. A failure to pay the debt, in whole or in part, when it is due, is necessarily a breach. That is an inherent or essential feature of a mortgage, and the right to enforce the security in court is not to be construed away, or regarded as limited, except by clear expression. In the case of Guaranty Trust, etc., Co., vs. Green Cove, etc., R. Co., 139 U. S., 137, 11 Sup. Ct., 512, it is held that it cannot be absolutely abrogated. That is authoritatively settled; whether upon good reason need not be considered. The cases cited wherein the right of the trustee was declared to be restricted have reference to special powers to be exercised by the trustee without the aid or order of a Court, powers not necessarily inherent in or essential to the very definition of a mortgage. The right of a trustee to take possession is not essential. It may or may not exist, and when it is given in connection with clauses that limit the exercise of it, even though the terms used be permissive, they will be regarded as exclusive. And so, too, a right to sell at public auction without foreclosure and like special powers, will be considered as controlled by such limitations as the mortgagor chooses to impose. Counsel has insisted upon the significance of the case of Railroad Co. vs. Fosdick, 106 U. S., 47, 1 Sup. Ct., 10, where the Court says that if, as a matter of fact, the principal debt had been declared due, still the trustee would not have been entitled to sue for a foreclosure of that part of the debt without averring the request of the bondholders provided for in the clause of the mortgage then under consideration. Counsel asked: 'How is that to be distinguished from a suit to foreclose for the interest which has become due?' If the trustee has it within his power to declare, and declares the principal debt due, that is then as much due as the interest, and, therefore, the rule with reference to them must be the same. That is the argument, and it is certainly not without a good deal of force; but, in the same case we find the Court saying that either the trustee or the bondholders might have a foreclosure for default in the payment of the interest; and the reason for the distinction is given at length in the opinion."

In the case of *Central Trust Company vs. St. Joseph and Grand Island Railroad Company*, which was de-

cided in the United States Circuit Court for the District of Nebraska by Mr. Justice SANBORN in November, 1895, the same question arose. The mortgage in that case provided that if default should be made in the payment of interest, and should continue for six months, it should be lawful for the trustee to foreclose by judicial proceedings.

It was insisted—as it has been in this case—that the permissive clause excluded a remedy by foreclosure before the lapse of the six months.

The decision of Mr. Justice SANBORN has not been reported, but he held that the mortgage was given to secure the payment of a debt; that whenever a coupon representing interest became payable, a bill to foreclose might be maintained, in the absence of any stipulation by which the mortgagee agreed that it would not exercise the right which it had in equity; that the foreclosure might proceed unless there was the express prohibition of such equitable right; and he laid stress—as Judge WOODS did—upon the possession clause. In considering whether the permission to foreclose after six months took away the immediate right of foreclosure, he said that if a promissory note was made payable at the end of four months, and there was added to it the provision that in six months an action might be maintained upon it, it would not deprive the owner of the note of the right to proceed immediately upon default in payment of the debt; and, after a careful consideration of the decisions, some of which are referred to in appellant's brief, and others cited in the Toler case, *supra*, he held that without an express prohibition, or express agreement that the right to foreclose should not be exercised till the expiration of six months after demand in writing, that right existed, and immediate suits for foreclosure might be maintained.

In *Farmers' Loan and Trust Co. vs. Chicago and Northern Pacific Railroad Co.*, 61 Federal Reporter, 543, there were provisions regulating the right of the

trustee to enter and sell, in case of default for six months, and also a provision that it should be the duty of the trustee, upon a requisition of bondholders, to proceed to enforce the bondholder's rights, either by the exercise of the summary powers, or by suit or suits in equity. It was contended that this provision prohibited the institution of a suit in chancery to foreclose for default in interest until the default should continue for six months.

It was held by Mr. Justice JENKINS that this provision in no way affected the right of the trustee to foreclose immediately upon default in payment of interest. It did not interfere with the exercise of the discretion of the trustee to act, or limit its right to act immediately upon default. He said that, while it was true that a mortgagor had the right to stipulate for a breathing spell for the payment of his matured debt, it was still true that the limitations upon the powers of the trustee to take legal proceedings to enforce payment upon default should be strictly construed (citing *Guaranty Trust Co. vs. Green Cove R. R.*, 139 U. S., 137).

The case of *Chicago and Vincennes Railway Co. vs. Fosdick*, 106 U. S., 47, upon which counsel for appellant relies, does not sustain his contention. The decision in that case was that a foreclosure bill would not lie within the six months to foreclose *for principal* where the mortgage provided that the principal could not be declared due or foreclosure for principal had until after six months' default in the payment of interest, but the Court sustained the right to foreclose forthwith for non-payment of interest.

II. But if there were any ground for construing the provisions of this mortgage as preventing a foreclosure by suit until after six months' default, the objection can be made only by the mortgagor defendant. It did not take advantage of the objection, and no one else can do so now.

Guaranty Trust Co. vs. Green Cove R. R., 139 U. S., 137.

In the case cited Mr. Justice BROWN says (p. 143):

"Again, it is evident that this was a condition for the benefit of the grantor and its assigns, and that intervening lien holders and those who have purchased the property under decrees in their favor do not stand in a position to take advantage of this covenant. The sole object of the covenant was to protect the mortgagor against a seizure and sale of its property for non-payment of interest or principal at the mere caprice of the trustee, or without the consent of a majority of the bondholders, and it has no application to a case where the mortgagors have already lost the property under adverse proceedings instituted by parties having no connection with the mortgage."

This language is directly applicable to the present case. At the time of filing the foreclosure bills the mortgagor had lost the property under adverse proceedings instituted by parties having no connection with the mortgage.

The effect of the appointment of a Receiver upon a judgment creditor's bill is to remove the income of the mortgaged property out of the reach of the bondholders. It takes the earnings away from the debtor. They cannot be applied for the benefit of the mortgagee until he procures the appointment of a Receiver in his own suit. In order, therefore, to bring the income within the mortgage, the mortgagee must file his bill and assert his rights.

See

American Bridge Co. vs. Heidelbach, 94 U. S., 798.

Railway Co. vs. Cowdrey, 11 Wallace, 459.

These cases show that it is the right and duty of the trustees to have an immediate appointment of a Receiver of their own, in order to reach the income and earnings applicable to the mortgage security, thereby preventing them from being taken away from both mortgagor and mortgagee and applied to the benefit of a junior judgment creditor.

It would be in the highest degree inequitable to require the trustee to stand idly by for six months after default and allow the security of his *cestuis que trustent* to be absorbed by a general creditor. A trustee neglecting to proceed under such circumstances would be derelict in duty.

But it would be most extraordinary to reverse a decree on the ground asserted when the objection was never made to the Circuit Court in any way whatsoever.

This disposes of the second and third assignments of error.

Fourth. THE COURT WAS NOT BOUND TO REQUIRE THE RECEIVER TO PAY THE INTEREST ON THE BONDS.

I. The fourth assignment of error is to the effect that the Circuit Court erred in directing that moneys in the Receiver's hands should be applied to making improvements of the property, and in not directing him to pay the interest on the bonded debt.

The right and power of a court of equity, having possession of a railway, to make such orders as it may deem necessary to enable the common carrier to perform its duties to the public, needs no argument to support it. The orders were proper and no one ever questioned them or objected to them.

The proposition that it is the duty of a court in a foreclosure suit to ascertain whether or not the mortgagor has property applicable to the payment of the amount in default certainly does require some authority to support it.

It is impossible to cite any authority or to assert a single legal reason why, in a foreclosure suit where there is no defense, a court is bound to inquire as to the ability of the mortgagor to pay his debts.

If it were asserted that no court had a right to foreclose a mortgage upon the real estate of a natural person until it had ascertained whether he was solvent or not or able to pay his debt, the proposition would carry with it its own refutation.

If the rules of law applicable to the foreclosure of a railway mortgage are wholly different from those applicable to any other foreclosures, then it would seem that some authority should be cited to sustain the alleged distinction.

II. It was asserted in the second petition that the bondholders and stockholders of the New Albany Company entered into an arrangement and agreement for the purpose of procuring a sale of the property without the payment of the liabilities of the company *(Record*, p. 193*)*. There is nothing in the way of proof of this allegation, and of course it cannot be considered.

If the bonds were valid the enforcement of the mortgages securing them, which would of necessity have cut off floating creditors and subsequent lien holders, would be neither illegal nor fraudulent. If the bondholders had a legal right to collect their debts by foreclosing the mortgages, they could not expose themselves to liability by exercising that right, and an allegation that it was done with fraudulent intent and purpose would amount to nothing.

McLean vs. King, 144 U. S., 260.

Allegations are contained in the second petition that the Mills bill was filed for the purpose of hindering and delaying the general and unsecured creditors *(Record*, p. 192*)*, and that the bills to foreclose were filed for the same purpose. The case of *Continental Trust Co. vs. Toledo, St. Louis & Kansas City R. R. Co.*, 82 Federal Reporter, 642, was cited to support the contention of the petitioner. In that case the court says of like attacks by intervening creditors:

"They [the intervening creditors] have no standing in court at all to take part in the distribution of the assets of the defendant debtor, save as they accept the tender of the benefit made to them by the complainant in his bill. If they would be independent of this restriction they are at liberty to put their claims in judgment, and after a *nulla bona* return to file a creditor's bill of their own against any defendants they may select, and under it they may dispute all other claims. But, so long as they owe their right to be in court at all the sufficiency of the averments of the bill for the relief asked, they cannot be heard to question the very basis upon which alone the court can act."

If the charges made by the petitioner against the Mills judgment were true, then under this rule petitioner would have no standing whatever in court; but in the case cited the court disposes of this question by saying:

"*Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant upon which the bill is founded and the court obtains jurisdiction.*"

In the case last cited, the right of the intervening petitioner to challenge the bonds was put upon the sole ground that the *bondholders themselves* were parties to the creditor's bill, and that the assailing creditor had intervened under the same bill. The court says:

"In a hearing on a creditors' bill any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. * * * I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien."

But the court did not hold that a general creditor could intervene in the foreclosure suits and attack the validity of the bonds and mortgages in those suits.

Nor did it hold that a general creditor, who had in-

tervened without questioning the rights of the bondholders, could, after decree of foreclosure and sale, be heard to attack the bonds and mortgages, no intimation of any intention to do so having been given in any manner prior to the entry of the decree.

Fifth. THERE WAS NO ERROR IN REFUSING TO SET ASIDE THE ORDER OF SALE AND IN NOT POSTPONING THE SALE.

The application to set aside the order of sale, so-called, was an application to vacate a decree regularly entered in the cause. If the Louisville Trust Company was a party defendant to the foreclosure bills, with an answer or demurrer on file at the time of the decree and undisposed of, its remedy was by appeal from the decree, and not by motion to set it aside, for in that case the record would have shown that the decree was improperly entered. But, as we have seen, it was not a party, and had no right to appeal.

It then stood in the position of a mere intervenor *pro interesse suo* asking a favor of the Court. Appeals do not lie from such orders.

As to postponing the sale, that also was addressed to the discretion of the Court, and the discretion was properly exercised in refusing the application. If a party to the cause, having taken an appeal from a decree, makes application to postpone, such application will in a proper case be granted; but it is a mere exercise of discretion.

Bound vs. South Carolina R'way Co., 55 Federal Rep., 186.

Sixth. THE COURT PROPERLY DECIDED THAT THE SEVERAL MORTGAGES AND THE BONDS SECURED THEREBY WERE GOOD AND VALID OBLIGATIONS, AND CREATED GOOD AND VALID LIENS UPON THE PROPERTIES EMBRACED IN THE DECREE OF SALE.

It is not easy to see how one who has not raised any question with respect to the validity of the bonds and mortgages by answer or defense in the suit, can be heard upon an appeal to question the propriety of the decree of the Court sustaining the bonds and mortgages, where the corporation has interposed no defense.

The alleged objections to the validity of the mortgages are set forth in the second intervening petition. The sole ground of invalidity alleged is that the mortgagor corporation, which is a consolidated company, was never regularly consolidated, because under the law of Illinois and the decision of the Supreme Court of Illinois in the case of *American Loan & Trust Co. vs. Minnesota Co.*, 47 N. E. Reporter, 153, a railway corporation of Illinois could not be consolidated with a railway corporation of another State.

It may be noted that by the Act of the Legislature of Illinois, approved June 7, 1897, all railway consolidations affected by the decision cited were ratified and confirmed.

The statute is as follows:

"§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every agreement, whether in form of deed of sale, articles of consolidation, or otherwise, made and entered into between the first day of July, in the year Anno Domini one thousand eight hundred and seventy-four, and the first day of July, Anno Domini one thousand eight hundred and eighty-three, by and between any railroad company organized under the laws of this State or of this State

and any other State or States, and any railroad company or companies organized under the laws of any other State or States, providing or purporting to provide for the consolidation or merger of the capital stocks, corporate and other franchises, privileges and property of the respective companies parties thereto, and under which the consolidated company thereby created or attempted to be created, or its successor or lessee, now owns, controls or operates, or is in possession of, the several railway lines of the respective companies, parties to such agreement, be, and the same is hereby, ratified, approved and confirmed; and all the corporate rights, franchises, privileges and immunities of the several and respective companies, parties to every such agreement, are hereby granted, vested and confirmed in the consolidated company thereby created or attempted to be created for and during the term of its corporate existence and of any renewal thereof."

Laws of Illinois (Bradwell), 1897, pages 198, 199.

But there was no property of the mortgagor company in Illinois, except some leasehold interests, and examination of the case in 42 Northeastern Reporter, above cited, will show that it is not in any way applicable to the existing case, and proceeded on grounds peculiar to itself.

Moreover, it is well settled law that in an action to foreclose a mortgage securing bonds of a consolidated corporation of two different States, where from the time of the consolidation it exercised the franchises of a consolidated corporation, without objection from the State or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a *de facto* corporation, and both such *de facto* corporation and its stockholders, and creditors who claim to be general creditors of the same *de facto* corporation, are estopped

to assert its unauthorized existence as a corporation to avoid the bonds.

Farmers' Loan & Trust Co. vs. Toledo, Ann Arbor & North Mich. Rway. Co., 67 Federal Rep., 49, and cases cited.

Continental Trust Co. vs. Toledo, St. Louis & Kansas City Rway. Co., 82 Fed. Rep., 645.

See also:

Dallas Co. vs. Huidekoper, 154 U. S., 654.

Close vs. Cemetery, 107 U. S., 466, p. 477.

The guaranty upon which appellant's claim is based was made by the same company which made the mortgages.

The appellant, therefore, occupies the singular position of contending that the Louisville, New Albany and Chicago Railway Company was not a corporation having the power to incur a secured debt, but was a corporation having power to incur an unsecured debt.

The Louisville, New Albany and Chicago Railway Company, according to appellant's contention, could make a valid guaranty, but could not make a valid bond and mortgage.

These considerations seem to dispose conclusively of the contention of the appellant as to the validity of the mortgages.

Seventh. THE COURT WAS NOT REQUIRED TO MARSHAL THE ASSETS OF THE COMPANY BEFORE DIRECTING A FORECLOSURE SALE.

Appellant, in the ninth assignment of error, charges that the Court erred in directing a sale of the railroad properties without ascertaining what assets existed belonging to the company.

No such ascertainment was necessary, proper or usual in a foreclosure proceeding.

As to the net earnings of the receivership, the Court reserved full power to inquire in that regard.

There was no legal or equitable requirement that before directing a decree of foreclosure, the Court should direct the net earnings of the receivership to be applied to the payment of interest on the mortgage bonds sought to be foreclosed.

Moreover, no person interested made any application to the Court upon the subject, and the appellant is in no position to assert any such alleged error, because it never called upon the Court to take any such action.

Eighth. THE CONFIRMATION OF THE SALE WITHOUT GIVING TIME TO PARTIES TO FILE EXCEPTIONS WAS RIGHT AND PROPER.

All parties consented to the confirmation. The appellant, as we have seen, was not a party entitled to notice of the application to confirm, because it was never made a party of the cross-bills of foreclosure.

The provisions in Equity Rule 83, respecting exceptions to a Master's report do not apply to a report of a mere ministerial matter like a sale, but only a report upon matters heard and determined by him.

Pewabic Mining Co vs. Mason, 145 U. S., 349.

In that case the Court considers the proper practice upon motions to confirm Masters' sales, which is usually by an order *nisi*, followed, if no objections are taken in the time prescribed by the order, by an order of confirmation. There was no occasion for an order *nisi* in this case, because all the parties entitled to be heard were before the Court and not objecting, and the only object of requiring the report to be confirmed is to afford time, between the service of the order *nisi* and the absolute confirmation of the report, to others

to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage (145 U. S., p. 364).

The appellant does not suggest that there was any one in existence who would have come in and made a higher bid, and does not show that its interests were in any way prejudiced by the speedy confirmation.

Ninth. The appellant's contention is largely based upon the fallacy that general creditors of a mortgagor are entitled to intervene in a foreclosure proceeding to attack the mortgage under foreclosure.

A mere intervenor *pro interesse suo* has no right to contest the right to foreclose the mortgage.

To accord to him such a right would reverse all precedent.

The Supreme Court (in *Bronson vs. R. R. Co.*, 2 Black, 524) said :

" But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties. * * * If the right was conceded to one creditor it would have to be to another, and where the creditors are numerous, as in the case of railroad bondholders, the exercise of the right would lead to great embarrassment."

The proceedings in this case were not conducted in secretly ; they were matters of public notoriety. No step was taken in the forclosure suits in advance of the time when, under the rules, the complainants were entitled to proceed. The appellant, by refusing to proceed in an orderly way, furnishes good reason for the conclusion that its object was not in good faith to procure an adjudication of the merits of the alleged case, but to obstruct and impede the secured creditors in a just and reasonable effort to reorganize an insolvent and defaulting railway corporation.

The objection that proceedings in a court of equity have *not* been allowed to drag for long periods has not often been heard.

There is no legal reason why a mortgage upon a railroad should not be foreclosed as speedily as a mortgage upon an ordinary piece of property, and we know of no rule of law which entitles the creditor of a railway company to assume that such mortgages will not be foreclosed promptly where no defenses have been interposed.

Tenth. The writ of *certiorari* should be dismissed and the decree affirmed.

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